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No. 94-925

In the

# Supreme Court of the United States

October Term, 1994

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

*Petitioners*,

v.

JOHN W. HECHINGER, *et al.*,

*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS JOHN W. HECHINGER *et al.*

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## QUESTIONS PRESENTED

1. Were the lower courts correct in holding that the minor changes made by Congress, following this Court's prior decision striking down the Congressional Board of Review created to control the major decisions of the Metropolitan Washington Airports Authority, did not cure the separation of powers infirmities in the statutory scheme?

2. Even if the revised statute satisfies the requirements of separation of powers, is it nonetheless invalid because the members of the Board of Review exercise power under a federal statute and they are selected in a manner admittedly not in conformance with the Appointments Clause of the Constitution?

## PARTIES TO THE PROCEEDINGS

The respondent Citizens for the Abatement of Aircraft Noise, Inc., is a non-profit corporation that has no parents or subsidiaries.

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## BRIEF IN OPPOSITION FOR RESPONDENTS JOHN W. HECHINGER *et al.*

## OPINIONS BELOW

The opinion of the court of appeals is now reported at 36 F.3d 97.

## STATEMENT OF THE CASE

This case is the second in a continuing saga of congressional meddling in the operation of the Washington Metropolitan Airports. In respondents' prior challenge, this Court held that Congress cannot give a few of its Members veto power over the core functions of the petitioner Metropolitan Washington Airports Authority ("Airports Authority" or "MWAA"). After that decision, Congress tinkered at the margins with the structure of the Board of Review, but it continued to give its own agents substantial

supervisory control over crucial decisions involving the two airports. Both lower courts unanimously held that, because the superficially modified Board of Review still ensures that congressional agents will continue to have the power to shape the core actions of the Airports Authority, the Board of Review violates the separation of powers doctrine. In addition, the district court also ruled that, because the Board of Review exercises substantial federal authority, its members must be appointed in accordance with the Appointments Clause in Art. II, § 2, cl. 2, which they are not. Because both of these rationales would sustain the decision below, and because, as we now show, Congress did not make a serious attempt to comply with this Court's prior ruling, the Petition should be denied.

## The Original Board of Review

In contrast to all other commercial airports in the United States, which are operated by state, local, or regional authorities, Washington National and Dulles International Airports were owned and operated by the federal government prior to 1987. In 1984, a Department of Transportation advisory commission recommended that the two airports be leased to a regional authority, to be established by an interstate compact between the Commonwealth of Virginia and the District of Columbia, and governed by a body whose members would be appointed by the Governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President of the United States. Advisory Commission on Reorganization of the Metropolitan Washington Airports, Report to Secretary at 1, 3-6 (1984). The commission's report contained no recommendations for retained congressional or federal oversight, other than through the terms of the lease for the two airports and the presidential appointee on the governing body. *Id.*

Over the next two years, legislation implementing the advisory commission's recommendations was passed by the

U.S. Senate, the Virginia Assembly, and the D.C. Council, and was approved by the Subcommittee on Aviation of the House Committee on Public Works and Transportation. *See* 132 Cong. Rec. 7276 (1986); 1985 Va. Acts ch. 598; D.C. Law. 6-67 (1985); 132 Cong. Rec. 32135 (1986). During the congressional consideration of that legislation, there was complete agreement that federal funds had historically been inadequate to deal with the airports' problems and that some congressional action was sorely needed to create an infusion of capital. Senate Comm. on Commerce, Science, & Transportation, Metropolitan Washington Airports Transfer Act of 1985, S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985) ("Senate Report"). For Congress, the vexing issue was how to devise a financial solution and at the same time retain federal control.

Although many Members of Congress, led by Senators and Representatives who have since served on the Board of Review, objected to relinquishing federal control over the airports, the bills passed by the Senate and approved by the House Aviation Subcommittee contained no provisions for a congressional role in the ongoing operation of the airports. However, those bills were subsequently amended to add a Board of Review, comprised of nine Members of Congress, invested with the power to veto major actions of the Airports Authority, such as the adoption of an annual budget, the issuance of bonds, the promulgation of regulations, and the adoption of development and land acquisition plans. 132 Cong. Rec. 28521-25 (1986); Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6002-6012, 100 Stat. 3341 (1986) ("Airports Act"). As a precaution against Congress losing control over the Airports Authority as a result of an adverse ruling on the constitutionality of the Board of Review, a "drop-dead" clause was added, which provided that the Airports Authority would itself lose the power to perform any of the actions that were subject to the Board of Review's veto if a court declared the veto power unconstitutional. *See* 132 Cong. Rec. 32133 (1986).

In the House floor debate, which constitutes the only recorded congressional discussion of the original Board of Review provisions, numerous Members, led by those who have since served on the Board of Review, stressed the importance of the Board of Review as a mechanism for retaining congressional control over the airports.[1] Perhaps the most frank assessment came from Representative Smith, who stated:

> Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority.... We are getting our cake and eating it too.... The beauty of the deal is that Congress retains its control without spending a dime.

*Id.* at 32137.

As originally enacted, the Airports Act called for the establishment of a nine-member Board of Review that "shall consist of" Members of Congress with certain specified committee affiliations. 49 U.S.C. App. § 2456(f)(1). While the Airports Act proclaimed that members of the Board of Review would serve "in their individual capacities, as representatives of the users of the Metropolitan Washington

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[1]*See, e.g.*, 132 Cong. Rec. 32136 (1986) (statement of Rep. Coughlin, a present Board of Review member) (the bill "provides for continued congressional control over both airports"); *id.* at 32142 (statement of Rep. Conte, a former Board of Review member) (transfer would "not give up congressional control and oversight — that remains in a Congressional Board of Review"); *id.* at 32143 (statement of Rep. Hammerschmidt, a present Board of Review member) ("[w]e will have more control [through the veto power] than before. ... At present, pressure on FAA seems to be our only way to influence events at the two airports"); *id.* at 32135 (statement of Rep. Lehman, a present Board of Review member) (the "Congressional Board" would provide "for continuing congressional review over the major decisions of the new airport authority").

Airports," *id.*, they all had to be Members of Congress, and they could not be from Maryland, Virginia, or the District of Columbia. *Id.* Moreover, the Airports Authority was limited in its selection to a list of names submitted by the Speaker of the House and the President *pro tempore* of the Senate, who were not required to submit, and, in practice, did not submit, more names than the number of vacant slots. *Id.*

The original Board of Review had the power to veto the Airports Authority's core actions. 49 U.S.C. App. § 2456(f)(1) & (4). Thus, the Airports Authority could not authorize the issuance of bonds, appoint a chief executive officer, adopt an annual budget, approve development or land acquisition plans, or change its regulations, without first submitting its proposed action to the Board of Review for consideration and an opportunity to veto the decision. *Id.* § 2456(f)(4).

**This Court's Ruling**

Respondents John W. Hechinger and Craig Baab, who live under National Airport's flight path, and respondent Citizens for the Abatement of Aircraft Noise, Inc., a nonprofit membership organization of individuals and citizen groups who wish to minimize adverse noise, safety, and environmental effects of air traffic at National Airport, brought an action challenging the constitutionality of the original Board of Review, and this Court held that the Board of Review was unconstitutional. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298 (1991) ("*CAAN*").

The premise of that decision was the Court's conclusion that the Board of Review exercised sufficient federal power to be subject to the federal constitutional doctrine of separation of powers because it is "[1] an entity created at the initiative of Congress, [2] the powers of which Congress

has delineated, [3] the purpose of which is to protect an acknowledged federal interest, and [4] membership in which is restricted to congressional officials." *CAAN*, 111 S. Ct. at 2308 (numbering added). Moreover, Congress had conditioned the transfer of the airports on the establishment of the Board of Review, and it had provided that the Board's invalidation would prevent the Airports Authority from taking any action that would have been subject to the Board of Review's oversight. *Id.* at 2307. Elaborating, the Court was persuaded that the Board was an agent of Congress, rather than purely a state entity, because Congress exercised significant control over the composition of the Board of Review through the requirements that the Members had to be selected from lists submitted by the congressional leadership, which did not need to include more names than the available slots, and eight of the nine members had to come from the relevant congressional committees, which gave Congress control over any particular Member's eligibility to serve on the Board of Review. *Id.* at 2307-08. The recitation in the Airports Act that Members of Congress serve on the Board of Review "in their individual capacities, as representatives of users" of the airports, did not, in the Court's view, eliminate these many vestiges of congressional control. *Id.* at 2307.

The Court then held that, as a congressional agent, the Board of Review could not constitutionally exercise its veto authority. Without deciding whether the Board of Review's powers were properly characterized as executive or legislative, the Court concluded that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id.* at 2312. On that basis, the Court ruled that "the Board of Review is an impermissible encroachment" on the Executive Branch, without deciding whether it also violated the Incompatibility, Ineligibility, and Appointments Clauses. *Id.* at 2312 & n.23.

## The New Board of Review

In September 1991, the Subcommittee on Aviation of the House Committee on Public Works and Transportation held a hearing on amending the Airports Act. *Amendments to the Metropolitan Washington Airports Authority Act of 1986*, 102d Cong., 1st Sess. (1991) ("*1991 Hearing*"). At the hearing, Members of Congress from outside the Washington metropolitan area generally expressed a desire to retain congressional control over the airports. As one Representative described the task before Congress, "[a] solution must be found that will provide a constitutional mechanism for congressional participation in the authority's decision-making process." *1991 Hearing* at 36 (statement of Rep. Payne); *accord id.* at 19, 34-35 (statement of Rep. Mineta, a current and past Board of Review member); *id.* at 39 (statement of Rep. Poshard).[2]

At that time, the only bill that had been introduced contained a straightforward "report and wait" provision, which would have required the Airports Authority to submit certain of its actions to Congress for a specified period of time before they could go into effect. *1991 Hearing* at 8; H.R. 2718, 102d Cong., 1st Sess (1991). However, the Subcommittee also considered keeping the Board of Review intact, but removing some aspects of congressional control, or, alternatively, making the Board's role advisory only. *1991 Hearing* at 7-8.

Petitioners have claimed that, during these hearings, Congress "considered the views of local residents and nationwide users of the Washington Airports as well as the

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[2]In a candid statement about Congress' goal in recreating a Board of Review, Subcommittee Chair Oberstar observed that "[i]n the final analysis, they [the Supreme Court Justices] park out there, too. And they know what we are up to." *1991 Hearing* at 144.

views of constitutional law experts." Petition at 7. However, the Aviation Subcommittee did not invite respondents' attorneys or any neutral constitutional lawyers or law professors to testify. Instead, the Subcommittee invited only two witnesses — an attorney with the Congressional Research Service and a nonlawyer, political scientist — to discuss the constitutionality of possible modifications of the Board of Review in light of this Court's 1991 decision.

Even then, both witnesses concluded that Congress either had to eliminate all vestiges of congressional authority to appoint or remove the Board of Review members, or had to make the Board of Review's powers purely advisory. *See 1991 Hearing* at 202, 204, 208 (testimony of Johnny H. Killian, Congressional Research Service, & Jessica Korn). To eliminate congressional control, the witnesses recommended that there be no requirement that the Board of Review consist of Members of Congress, that the lists submitted by the congressional leadership be advisory only, and that Congress eliminate the drop-dead clause. *Id.* at 140, 209, 210 (Korn); *id.* at 202 (Killian).

Although some of the statutory revisions under consideration would have satisfied these principles, Congress ultimately did not heed this advice. The final bill neither removed all vestiges of congressional control, nor made the Board of Review's powers purely advisory. Instead, the final bill sought to accomplish the goal of the earlier law, while making only a few cosmetic changes, in the hope that they would insulate the new Board of Review from constitutional challenge. *See* Metropolitan Washington Airports Authority Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197 ("1991 Amendments").

The principal cosmetic change in the composition of the Board of Review is that the statute no longer expressly requires that its members be Members of Congress. Rather, the 1991 Amendments establish a series of membership

requirements that essentially serve as surrogates for a congressional membership requirement. In particular, the members of the Board of Review must: (1) "have experience in aviation matters and in addressing the needs of airport users"; (2) be frequent users of the Metropolitan Washington Airports; and (3) be registered voters in a jurisdiction other than Maryland, Virginia, or the District of Columbia. 49 U.S.C. App. § 2456(f)(2)(C). Members of Congress from districts outside the D.C. metropolitan area, especially those who serve on the airports oversight committees — *i.e.*, the Members who made up the old Board of Review — obviously will have no trouble meeting these requirements.

To ensure that such Members sit on the Board of Review, Congress retained the requirement that the nine members of the Board of Review must be selected by the MWAA Board of Directors from lists submitted by the Speaker of the House and the President Pro Tempore of the Senate. *Id.* § 2456(a)(1). Those lists are *not* advisory, as recommended by the two witnesses at the Aviation Subcommittee hearing. Moreover, the lists need not contain more names than the number of available slots. However, in an attempt to appear responsive to this Court's concerns, the 1991 Amendments provide that the Airports Authority may request that the congressional leadership submit additional names, and members of the Board of Review are now subject to removal for cause by a two-thirds vote of the Board of Directors. *Id.* §§ 2456(a)(1), (f)(1). Of course, as in the past, any replacements must come through the congressional nominations process.

Under the Amendments, certain specified actions of the Airports Authority must still be submitted to the Board of Review at least 30 (or, in the case of an annual budget, at least 60) days before they are to become effective. Like the original Airports Act, these actions include (1) the adoption of an annual budget; (2) an authorization to issue bonds and an annual plan for their issuance; (3) the adoption,

amendment, or repeal of a regulation; (4) the adoption or revision of a master plan; (5) the appointment of the chief executive officer; and (6) the approval of land acquisitions. *Id.* § 2456(f)(4). Not only did the 1991 Amendments not reduce these areas of Board of Review intervention, but it actually expanded item (6) to include long-term easements and land disposals, and added (7) the award of a contract (other than for bond issuances) and (8) the approval or modification of a terminal design or layout. *Id.* § 2456(f)(4)(A) and (B).

Under these Amendments, within the longer of 30 calendar days or ten legislative days of the submission to the Board of Review of these proposed actions, the Board may make "recommendations" to the MWAA Board of Directors regarding such actions, including a recommendation that an action not go into effect. *Id.* § 2456(f)(4)(C). If the Board of Review recommends that an action be modified, and the Board of Directors adopts that recommendation, then the action may go into effect as modified. *Id.* § 2456(f)(4)(D)(i). Similarly, the proposed action may take effect if the Board of Review does not make a recommendation within the specified time period. *Id.* § 2456(f)(4)(C).

On the other hand, if the Board of Review recommends that a particular action be modified or rejected, and the Board of Directors does not agree, then the proposed action may not go into effect at that time. Instead, the Board of Directors must transmit its proposed action, the Board of Review's recommendation, and its written evaluation and response to that recommendation to Congress for a 60-legislative-day review period. If, at the end of the 60 legislative days, Congress has not passed a joint congressional resolution of disapproval, then and only then may the action go into effect in the form in which it was originally proposed. *Id.* § 2456(f)(4)(D) & (5). In counting legislative days, the 1991 Amendments exclude Saturdays, Sundays, holidays, and any day on which neither House of

Congress is in session because of an adjournment *sine die*, or a recess or adjournment of more than three days. *Id.* § 2456(f)(4)(D)(ii). As a practical matter, this 60-day review period will almost always exceed three months, and could span even more than six months. Affidavit of Pamela Gilbert, ¶¶ 3-4 (Pet. App. 219a-220a). During that time, the proposed action remains in limbo.

As a result, the Board of Review has the power to delay an action for several months beyond the delays already inherent in the review process. That is the stick that the new Board of Review holds. In the case of the budget, this delay could freeze many operations of the Airports Authority, because the Authority may not obligate or expend any money in a fiscal year for which a budget has not gone into effect, except for debt service on previously authorized obligations, obligations and expenditures for previously authorized capital expenditures, and routine operating expenses. 49 U.S.C. App. § 2456(f)(4)(E).

The Board of Review may also ask the Airports Authority to consider, vote, or report on any matter "related to" either National or Dulles Airport, and the Airports Authority has a statutory obligation to comply with any such request "as promptly as feasible." *Id.* § 2456(f)(6). Members of the Board of Review may also participate as nonvoting members at all meetings of the Airports Authority's Board of Directors, *id.* § 2456(f)(7), and the Board of Review has paid staff located at MWAA's headquarters to monitor MWAA activities. Through these powers, especially when they are coupled with the threat of extensive delays under its review authority, the Board of Review has the power to initiate and shape actions of the Airports Authority, as well as to react to, and at least halt temporarily, proposed actions submitted to it.

Finally, the Amendments retain the drop-dead clause that this Court deemed to be a further indication of Congress' desire to retain control over the airports, *CAAN*, 111 S. Ct.

at 2307, and that one of the witnesses insisted be eliminated to save the Board of Review. *1991 Hearing* at 210. Thus, as with the prior Board of Review, if the new Board is unable to carry out its functions by reason of a judicial order, the Airports Authority thereafter shall have no authority to perform any of the expanded list of actions that are subject to Board of Review scrutiny. 49 U.S.C. App. § 2456(h).[3]

Congress never held a hearing to address the constitutionality of the Board of Review scheme contained in the final 1991 Amendments. Instead, the only input that it obtained came from an attorney employed by the Congressional Research Service, who, not surprisingly, concluded that the 1991 Amendments met the constitutional objections of the Court in *CAAN*. 137 Cong. Rec. H10,349 (daily ed. Nov. 18, 1991). The Executive Branch disagreed, taking the position as set forth in President Bush's signing statement that the Board of Review "would not cure the defects found by the Supreme Court [and] would violate the Appointments Clause of the Constitution." Signing Statement (Dec. 18, 1991).

In February 1992, the Speaker of the House submitted a list of five nominees, which consisted entirely of Members of the House of Representatives, four of whom were then

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[3]As a further indication of Congress' intent to continue to control operational decisions of the Airports Authority, the conference report admonished the Authority to minimize walking distances between terminals and between terminals and parking facilities, to have a permanent system of moving sidewalks to transport people between the various terminals and parking facilities, and to afford its employees wages and benefits equivalent to what they received when they were employed by the federal government. H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 474-75 (1991). Moreover, the conference report stated that the Airports Authority should report to the Board of Review on these matters and that Congress would continue to monitor MWAA's progress. *Id.* at 475.

serving on the House Committees with oversight responsibility over transportation matters, and all of whom had been members of the old Board of Review at the time of this Court's decision. Plaintiffs' Statement of Material Facts ¶ 1 (Pet. App. 217a). Shortly thereafter, the President *pro tempore* of the Senate submitted the names of three Senators who were serving on the Senate Committees with oversight responsibility over transportation matters, and who had been members of the Board of Review in June 1991, and the name of one individual who is not a Member of Congress. *Id.* ¶ 2 (217a-218a). Not surprisingly, the MWAA Board of Directors chose all of the individuals who were nominated by the congressional leadership to the Board of Review. *Id.* In other words, the new Board of Review was identical in composition to the old Board, except for the addition of one individual who is a not a Member of Congress.[4]

**The Decisions Below**

Respondents filed this action challenging the new Board of Review on separation of powers, Appointments Clause, and Ineligibility and Incompatibility Clause grounds. In a memorandum opinion and order issued on January 31, 1994, United States District Judge Joyce Hens Green, who had upheld the Board of Review in the first case, ruled that the

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[4]That individual is Drew Lewis, formerly Secretary of Transportation, and currently president and chief executive officer of Union Pacific Railroad. Since the appointment of the Board of Review, one Senator submitted his resignation from the Board of Review, not to the MWAA Board of Directors, but to the majority leader of the Senate. He was then replaced by another Senator. Three of the congressional Board of Review members — former Representatives Hammerschmidt, Lehman, and Coughlin — were not reelected to Congress, but continue to serve on the Board of Review.

1991 Amendments failed to cure the constitutional defects in the Board of Review scheme. Pet. App. 33a-34a.

First, the court concluded that the 1991 Amendments' "criteria and conditions create an entity that is unquestionably an agent of Congress." Pet. App. 29a. More specifically, Congress ensured that "many members of Congress – and few others — will be eligible to serve on the Board of Review ..., and more fundamentally, either the Speaker or the President *pro tempore* must select every member of the Board of Review." Pet. App 29a-30a. Not only did Congress retain "extraordinary control over the composition of the Board of Review," but it also created the Board of Review and delineated its powers to protect an acknowledged federal interest. Pet. App. 30a.

Second, the district court found that the Board of Review "exercise[s] significant control over the Airports Authority and management over its core aspects of operation ...." *Id.* After noting that the new Board of Review has the power to influence even more actions than its predecessor, Pet. App. 31a, the court concluded that, under the new scheme, "the Airports Authority must either bow to the will of the Board of Review, or risk the time and uncertainty of congressional action" for as long as six months. Pet. App. 32a. In the court's view,

> This power is far more than merely "advisory" as defendants claim; it gives the Board of Review the power to coerce the Airports Authority to comply with any "recommendation." The Constitution does not permit this agent of Congress to play such an influential role in controlling the actions of the Airports Authority. *Id.*

Third, having concluded that the Board of Review exercises significant federal power over the Airports Authority, the district court held that its members constitutionally must be, but were not, appointed in

accordance with the Appointments Clause. Pet. App. 32a-33a. In reaching this conclusion, the district court rejected the Airports Authority's claim that the Board of Review is a nonfederal, interstate agency not subject to the Appointments Clause as "clearly ... without merit" in light of this Court's decision that the original Board of Review is subject to separation of powers principles. Pet. App. 33a, *citing CAAN*, 111 S. Ct. at 2306-07. Accordingly, the court declared that the Board of Review is unconstitutional and that its future actions are invalid. Pet. App. 34a.

Because of the importance of the Board of Review's authority to MWAA's operations and the effect of the drop-dead clause, the Airports Authority and the Board of Review thereafter asked the district court to stay the effective date of its order, which the court did for a period of 75 days, Pet. App. 35a-38a, which the court of appeals subsequently extended. Pet. App. 39a. In support of the motion in the district court, the Airports Authority submitted an affidavit of its general manager, James Wilding, contending that the Airports Authority would suffer irreparable harm from its inability to undertake many of the actions subject to the Board of Review's powers. Thus, the affidavit asserted that even a hiatus of a few months would jeopardize contracts for airport food service, installation of a runway lighting system, institution of a taxi permitting system at National Airport, and development of a telecommunications system. Wilding Affidavit ¶¶ 4-9 (February 14, 1994), *cited at* Pet. App. 15a.

The case was briefed and argued on an expedited basis, and the court of appeals, in a unanimous opinion by Circuit Judge Buckley, joined by Circuit Judges Williams and Rogers, affirmed on separation of powers grounds, without reaching the Appointments Clause issue. Pet. App. 19a. It began its analysis by examining whether the new Board of Review continued to be an agent of Congress. It specifically found that "[n]o single factor is dispositive," Pet. App. 6a, and that elimination of the requirement of congressional membership "does not end our inquiry." Pet. App. 7a.

The court then followed the functional approach specifically mandated by this Court's prior decision in *CAAN*, examining both the new rules for membership and the reality of who had become and is likely to become a member in the future. Pet. App. 8a-9a. The court was "struck by Congress's choice of the period within which the Board [of Review] must make its recommendations: the longer of 30 calendar days or 10 legislative days," finding "no reason for such a provision other than to serve the convenience of the Members of Congress who were expected to serve on the Board." Pet App. 9a. Finally, the court of appeals reviewed the new qualifications for membership and the fact that the Airports Authority is permitted to select nominees only from the lists provided by the two Houses of Congress. *Id.* It therefore concluded that "Congress retains control over appointments" to the Board, and "Congress intended the Board to serve, and we hold that it does serve, as its agent." Pet. App. 10a.

Next the court analyzed the issue of whether the Board of Review exercises federal power and, based upon a review of all its powers and their source in federal law, concluded that it did. The Board's principal contention there, as here, was that its function was purely advisory and that the statute operated like traditional report and wait provisions. But the court of appeals rejected that analogy, finding that action by the Board of Review alone could determine "whether action taken by the Directors will be allowed to take immediate effect or be subjected to a 60-statutory-day congressional review," and concluding that it is "this discretion that provides the Board its leverage." Pet. App. 12a.

The Board also sought to rely on the decisions in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989), both of which arose under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-

3556 (1988). However, the court of appeals recognized that those decisions were distinguishable because the Airports Act "does not allow the Authority to override the Board, a safeguard that both *Lear* and *Ameron* viewed as vital in concluding that the stay provisions" were constitutional. Pet. App. 14a-15a. It found that the inability to override "is a serious hindrance to the Authority" and that the "pressure to avoid such costly interruptions by accommodating the Board is self-evident." Pet. App. 15a. The court then rejected the Board's attempt to equate its ability to stop major decisions of the Authority for periods of up to six months with other means of congressional influence, finding "a qualitative difference" between the two: " — the difference between persuasion and coercion." Pet. App. 16a. Accordingly, the court upheld the decision of the district court on separation of powers grounds, but ordered that the previous actions taken by the Board not be invalidated. Pet. App. 19a.

## REASONS FOR DENYING THE WRIT

1. The principal reason why review should be denied is that the decision below is so plainly correct as not to warrant further consideration by this Court. The 1991 Amendments made a series of cosmetic changes to the Airports Act that responded only superficially to the separation of powers problems that plagued the original Board of Review. The result is a less blatant, but nonetheless still unconstitutional meddling by Congress in the affairs of the local airports.

Ultimately, Congress still insisted on aggrandizing itself, by giving its agents impermissible control over major decisions affecting the airports. It gave the congressional leadership the power to pre-select the Board of Review, and it laid out criteria that ensured that Members of Congress would be among the few who would qualify to serve on the Board of Review. It also kept the drop-dead clause to ensure that the Airports Authority would be powerless to run the

airports if Congress were precluded from overseeing its actions. As a result, the renewed Board of Review, like its predecessor, is a congressional agent, which may not, under the Constitution, exercise retained federal power to control the actions of the Airports Authority.

In contravention of the doctrine of separation of powers, Congress has delegated to this congressional agent the federal power to coerce the Airports Authority into acting in accordance with the Board of Review's wishes. That power is far more than "mere advice or influence," as the petitioners suggest (Pet. at 21). Instead, as the court of appeals recognized, the "mere existence of this power to delay provides the Directors with an enormous incentive to avoid confrontations by tailoring their decisions to suit the Board's pleasure; it also gives the Board the power to hold an important decision hostage in order to secure the Directors' agreement to an unrelated matter." Pet. App. 18a.

Ordinarily, when an Act of Congress is struck down, this Court will review the lower court decision. Thus, when the original challenge to the Board of Review was before this Court after the D.C. Circuit held that it violated separation of powers, respondents did not oppose *certiorari*, and the Court accepted the case, then ruling against the Board on the merits. In this situation, there is not only a prior decision of this Court for petitioners to surmount, but a legislative history of the 1991 Amendments, described at pages 7-13 of this Opposition, that evidences only the most minimal attempt to comply with the letter of this Court's prior ruling, and no attempt at all to deal with the underlying rationale of the decision: to prevent undue congressional interference with the operation of Dulles and National Airports by means short of enacting legislation. Under these circumstances, where there is substantial doubt, based on the words and deeds of those who supported the 1991 Amendments, whether Congress made a good faith attempt to meet this Court's objections, there is no reason for this Court to review the

court of appeals' decision striking down those Amendments on separation of powers grounds.

2. The Petition argues (pp 14-21) that review is warranted because there is a conflict between the decision below and (1) decisions of this Court upholding report and wait provisions, and (2) the decisions of the Ninth and Third Circuits in *Lear* and *Ameron*, which upheld a statute allowing the Comptroller General to review certain contracting decisions, including the power to extend the time for completing such review. Assuming that those latter decisions survive this Court's subsequent ruling in *Bowsher v. Synar*, 478 U.S. 714 (1986), an issue that became moot when Congress changed the applicable statute after this Court had agreed to review the lower court's ruling in *Ameron*, the court of appeals correctly distinguished those decisions because the statute at issue in them contained an express authorization for the agency to override the delay when necessary for operational reasons, but no such authority is granted under the Airports Act. Pet. App. 13a-15a.

Petitioners' attempt to utilize the authorities upholding report and wait provisions is equally unavailing. In those statutes, the review is automatic, and the time allowed for review cannot be shortened or lengthened by any action of any body of Congress. Under those provisions, only a statute can prevent the reported action from becoming law, and only a statute can effect a delay of even a day in the effective date of any such action. By contrast, under the 1991 Amendments, there is no automatic report and wait; instead, Congress never receives a report, and there is no congressional waiting period, unless the Board of Review affirmatively decides that there shall be one. To be sure, the "wait" can be avoided if the Directors of the Airports Authority accept the Review Board's "recommendations," either before or after the proposed action is formally transmitted to them, a circumstance that is wholly lacking in any other report and wait provision that this Court has approved.

3. Even if petitioners could avoid the pitfalls of the separation of powers doctrine, the Board of Review could still not exercise its assigned powers for another reason. The powers of the Board of Review are derived solely from the Airports Act, including the 1991 Amendments. As a result, it exercises significant delegated federal authority, which, under *Buckley v. Valeo*, 424 U.S. 1, 121, 140-41 (1976), means that its members are officers of the United States who must be appointed in accordance with the Appointments Clause, which petitioners concede did not happen here. The Appointments Clause ensures that the Executive Branch, rather than Congress, appoints and supervises those individuals who perform significant federal executive functions, and it applies even if the Board of Review is not a congressional agent. Neither Congress nor an interstate compact agency may appoint officers of the United States. Accordingly, because the Board of Review was appointed in violation of the Appointments Clause, the judgment below would have to be affirmed on that basis as well.[5]

* * * * *

Congress has had two chances to create a Board of Review that meets the requirements of the Constitution. This Court struck down its first attempt, and all four judges who have considered the 1991 attempt have found it seriously wanting. The Constitution is clear that, despite Congress' wish of "getting our cake and eating it too," (*supra* at 4), if Congress wishes to retain control over National and Dulles Airports, it may continue to do so, but only by passing laws in the manner prescribed by the Constitution. The time has come to conclude this attempted end-run on the Constitution

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[5] As a corollary, the Incompatibility Clause, Art. I, § 6, cl. 1, bars Members of Congress from holding any non-congressional office under the laws of the United States. Thus, service on the Board of Review by present Members of Congress violates this provision as well as the Appointments Clause.

by denying the Petition. Then, under the stay which continues in effect until March 31, 1995 (assuming the Court acts on the Petition in January), Congress can promptly create a constitutional Board, with advisory functions only, or dispense with the whole idea entirely.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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